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No.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

ROCKY L. RELIFORD CORPORAL
UNITED STATES MARINE CORPS, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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QUESTION PRESENTED

Whether it is a denial of due process for a military court to convict a service member by a two-thirds vote for an offense which carries a mandatory life sentence when Article 52(b)(2) of the Uniform Code of Military Justice requires a three-fourths vote to impose a sentence in excess of ten years confinement?

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. -

ROCKY L. RELIFORD CORPORAL
UNITED STATES MARINE CORPS, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

The petitioner, Rocky L. Reliford, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Military Appeals rendered in this proceeding on August 12, 1988.

OPINIONS BELOW

The opinion of the United States Court of Military Appeals, *United States v. Reliford,* ____ M.J. ____, No. 59254/MC (C.M.A. 12 August 1988), is reprinted as Appendix A.

The opinion of the United States Navy-Marine Corps Court of Military Review, rendered September 30, 1987, is not reported. *United States v. Reliford,* No. 86 4905 (N.M.C.M.R. 30 September 1987) (unpublished). It is reprinted as Appendix B.

JURISDICTION

The United States Court of Military Appeals granted the petition for review in this case on January 22, 1988. The decision of that court was rendered on August 12, 1988, affirming petitioner's conviction of August 20, 1986,

as affirmed by the United States Navy-Marine Corps Court of Military Review on September 30, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTES INVOLVED

10 U.S.C. § 852(a)-(b), Article 52(a)-(b), Uniform Code of Military Justice. Number of Votes Required.

> (a) (1) No person may be convicted of an offense for which the death penalty is made mandatory by law, except by the concurrence of all the members of the court-martial present at the time the vote is taken.
>
> (2) No person may be convicted of any other offense, except as provided in section 845(b) of this title (article 45(b)) or by the concurrence of two-thirds of the members present at the time the vote is taken.
>
> (b) (1) No person may be sentenced to suffer death, except by the concurrence of all the members of the court-martial present at the time the vote is taken and

for an offense in this chapter expressly made punishable by death.

(2) No person may be sentenced to life imprisonment or to confinement for more than ten years except by the concurrence of three-fourths of the members present at the time the vote is taken.

(3) All other sentences shall be determined by the concurrence of two-thirds of the members present at the time the vote is taken.

10 U.S.C. § 918, Article 118, Uniform Code of Military Justice.

Murder.

Any person subject to this chapter who, without justification or excuse kills a human being, when he—

(1) has a premeditated design to kill;

(2) intends to kill or inflict great bodily harm;

(3) is engaged in an act which is inherently dangerous to others and evinces a wanton disregard of human life;

(4) is engaged in the perpetration or attempted perpetration of burglary, sodomy, rape, robbery, or aggravated arson;

is guilty of murder, and shall suffer such punishment as a court-martial may direct, except if found guilty under clause (1) or (4), he shall suffer death or imprisonment for life as a court-martial may direct.

STATEMENT OF THE CASE

Petitioner was tried by general court-martial (composed of seven officer and four enlisted members) on 16 and 30 June, 1, 2, and 3 July, and 8, 11-15, and 18-21 August 1986 for violating Articles 81, 118, 121 and 123, Uniform Code of Military Justice.[1] Pursuant to his pleas, peti-

[1] 10 U.S.C. §§ 881, 918, 921 and 923 (1982).

tioner was found guilty of larceny of currency totalling $6,055.00. Contrary to his pleas, petitioner was found guilty of one specification of conspirary to commit murder and one specification of conspiracy to commit robbery, both in violation of Article 81, UCMJ, and two specifications of premeditated murder while perpetrating robbery. Petitioner was sentenced to be confined for life, to forfeit all pay and allowances, to be reduced to pay grade E-1, and to be discharged from the Naval Service with a dishonorable discharge. The convening authority approved the sentence as adjudged.

The members were instructed by the military judge that concurrence of at least two-thirds (eight of eleven) of the members was required for a finding of guilty. Record at 770. During the pre-sentencing phase of the trial, the military judge further instructed the members that a vote of three-quarters was required before a sentence including a reduction in rate, fines or forfeitures of pay, or a punitive discharge could be imposed. Record at 817. The members were further informed that a mandatory life sentence was to be imposed based on their verdict, and, thus, they were not instructed to vote on the confinement aspect of the sentence. Record at 812. The sentencing worksheet provided to the members left no option as to confinement. In fact, the imposition of a life imprisonment sentence was previously filled in by the trial court. Appellate Exhibit CXXXIV.

Premeditated and felony-murder charges carry a mandatory minimum sentence of life imprisonment. Article 118, U.C.M.J., 10 U.S.C. § 918. By his conviction, and the procedures employed by the trial court below, petitioner was automatically sentenced to confinement for life pursuant to Article 118, UCMJ.

The question presented to this Court in petitioner's writ of certiorari was raised before the Navy-Marine Corps Court of Military Review. The Court of Military Review held a three-fourths verdict was not required for a guilty finding to permeditated murder. This issue was not raised before the Court of Military Appeals.

The Navy-Marine Corps Court of Military Review affirmed the findings and sentence. *United States v. Reliford,* No. 86 4905 (N.M.C.M.R. 30 September 1987) (unpublished). The Court of Military Appeals consolidated the conspiracy specifications holding conspiracy to commit murder and conspiracy to commit robbery were multiplicious. All other findings and the sentence were approved. *United States v. Reliford,* ____ M.J. ____, No. 59254/MC (C.M.A. 12 August 1988).

Petitioner submitted an application of extension of time to file for a writ of certiorari. The time to petition for the writ was extended by order of this Court from October 11, 1988 until November 10, 1988.

REASON FOR GRANTING THE WRIT

THE WRIT SHOULD BE GRANTED TO ENSURE MILITARY COURTS COMPLY WITH THE REQUIREMENTS OF ARTICLE 52(B)(2) OF THE U.C.M.J., DUE PROCESS OF LAW, AND THE MANDATE OF CONGRESS, THAT NO MILITARY MEMBER BE SENTENCED TO CONFINEMENT FOR LIFE EXCEPT BY THE CONCURRENCE OF THREE-FOURTHS OF THE MEMBERS.

This case poses an issue of statutory construction of three sections of the Uniform Code of Military Justice (UCMJ). Military courts have construed the sections to be in conflict despite the clear language of the sections and the intent of Congress embodied within. Having created a false conflict, military courts have resolved it by reducing the precentage vote required for a conviction for premeditated and felony murder from the required three-

fourths vote to a mere two-thirds. *United States v. Shroeder,* 27 M.J. 87 (C.M.A. 1988); *United States v. Walker,* 7 U.S.C.M.A. 669, 23 C.M.R. 133 (1957).

Article 52(b)(2) of the UCMJ provides:

> No person may be sentenced to life imprisonment or to confinement for more than ten years, except by the concurrence of three fourths of the members persent at the time the vote is taken.

Petitioner was convicted of premeditated murder under Article 118 of the UCMJ which provides for a mandatory life sentence. These sections are compatible. Congress has required a three-fourths vote to sentence to life imprisonment and it has set a mandatory life sentence for premeditated and felony murder. Accordingly, Article 52(b)(2) and Article 118, when read together, require a three-fourths vote to convict where the mandatory minimum sentence also requires a three-fourths majority.

Congress' concern with the severity of a life sentence is clear. By requiring a three-fourths vote, Congress ensured that such a sentence be imposed only after the most careful deliberation. Additionally, the Due Process Clause requires that court-martial proceedings foster accuracy. *McKeiver v. Pennsylvania,* 403 U.S. 528, 543 (1971). When members vote to convict someone of premeditated murder, they are in practical effect also voting on a sentence. Article 52(b)(2) makes clear Congress' intent that accuseds who are facing more serious sentences be given the protection of a three-fourths vote.

The courts below, however, have seized on a third section, Article 52(a)(2), and held that it conflicts with Articles 52(b)(2) and 118. Article 52(a)(2) states:

> No person may be convicted of [any offense other than one carrying the mandatory death penalty] ex-

> cept. . . by the concurrence of two-thirds of the members present at the time the vote is taken.

The government argued below, and the courts held, that because Article 52(a)(2) calls for a two-thirds vote to convict and Article 118 requires a mandatory minimum life sentence, Article 52(b)(2) must be overridden. Nevertheless, the three sections can be interpreted harmoniously.

The three-fourths vote required by Article 52(a)(2) includes within it, as a matter of mathematical necessity, the two-thirds vote required by Article 52(a)(2). By instructing the members that a three-fourths vote is required to convict in Article 118 (1) and (4) murder cases, the military judge could have easily harmonized all three sections. In this case, had nine of the eleven members voted for conviction, then the accused would have been convicted by at least two-thirds of the members voting, satisfying Article 52(a)(2). Because the life sentence is the mandatory minimum, he would have also been sentenced by the three-fourths majority required by Article 52(b)(2).

There is no ambiguity or conflict in the statutes and articles in issue. Even if there were, the principles for resolving such conflict are clear and lead to the construction urged by this petitioner. Under settled principles, this Court would adopt any fair construction of a statute by which serious doubt as to its constitutionality may be avoided. *Califano v. Yamasaki,* 442 U.S. 682, 693 (1979). This Court has been "willing to assume a congressional solicitude for fair procedure, absent express statutory language to the contrary." *Id.* Furthermore, ambiguity in a criminal statute must be resolved in favor of an accused. *Liparota v. United States,* 471 U.S. 419 (1985). Together these principles mandate a three-quarters vote on a verdict for which a life sentence will be imposed.

The government has no legitimate interest in requiring only a two-thirds vote for a premeditated murder conviction, and thus necessarily, a sentence of life imprisonment. The military community and society on the whole do not benefit by allowing conviction and sentencing for this serious offense on a two-thirds as opposed to three-fourths vote. There is no legitimate reason for systematically increasing the possibility of life imprisonment by reducing the percentage of members necessary to convict under Article 118.

Verdicts based upon a two-thirds concurrence are inherently less reliable than those imposed upon a three-quarters concurrence. In this case, where the members panel consisted of eleven individuals, conviction was obtained by only 8 votes, not 9 votes as mandated by the three-quarters rule. Petitioner's private interest in the accuracy of the findings at trial, which placed his life and liberty at risk, is "almost uniquely compelling". *Ake v. Oklahoma,* 470 U.S. 68, 78 (1985). Verdicts based on 10-2, 9-3, and 6-0 votes have been found to serve the goal of accuracy. *Apocada v. Oregon,* 406 U.S. 404 (1972); *Johnson v. Louisiana,* 406 U.S. 356 (1972). A verdict, and requisite sentence of life imprisonment, based on an 8-3 vote has not. The two-thirds vote in this case denied Petitioner a fair and impartial trial in deprivation of his due process rights.

CONCLUSION

Petitioner respectfully requests that this petition be granted to ensure that imposition of a mandatory life imprisonment sentence for premeditated and felony-murder be given only upon a three-quarters vote of guilt by the members in compliance with Article 52 (b)(2) UCMJ, and due process of law.

APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

USCMA Dkt. No. 59254/MC
CMR Dkt. No. 86-4905

UNITED STATES, APPELLEE

v.

ROCKY L. RELIFORD (299-68-2156), APPELLANT

12 August 1988

ORDER

On Consideration of the petition for grant of review of the decision of the United States Navy-Marine Corps Court of Military Review and the Government's concession, we conclude Issue II raised by appellate defense counsel has some merit. Appellant was convicted of two conspiracies although the evidence shows that there was one agreement between appellant and his co-actors to commit murder and robbery. In such situations there is one conspiracy. See *United States v. Kidd,* 13 U.S.C.M.A. 184, 190, 32 C.M.R. 184, 190 (1962); *cf. United States v. Snider,* 720 F.2d 985, 987-990 (8th Cir. 1983), *cert. denied,* 465 U.S. 1107, 104 S.Ct. 1613, 80 L.Ed.2d 142 (1984) . Therefore, specifications 1 and 2 of Charge I should be consolidated to allege one conspiracy to commit both the murder and robbery of Lance Corporal Hiquiana and Mrs. Hiquiana. Because appellant was convicted of an offense for which the sentence was mandatory, we are also satisfied that he suffered no prejudice as to sentence. Accordingly, it is by the Court this 12th day of August, 1988

ORDERED:

The said petition is granted on Issue II raised by appellate defense counsel; and

That specifications 1 and 2 of Charge I are consolidated* as the specification of Charge I to read as follows:

> Specification: In that Corporal Rocky L. Reliford, U.S. Marine Corps, Supply Company, Third Supply Battalion, Third Force Service Support Group, Fleet Marine Force, Pacific, Fleet Post Office, San Francisco 96604, did at Camp Kinser, Okinawa, Japan, from 15 February 1986 to 15 March 1986 conspire with Corporal Michael L. Shroeder, U.S. Marine Corps, and Lance Corporal Alan B. Clark, U.S. Marine Corps, to commit offenses under the Uniform Code of Military Justice, to wit: the robbery of monies of an unknown value, the property of Lance Corporal Raymond M. Hiquiana, U.S. Marine Corps and Mrs. Mabel L. Hiquiana, dependent wife of Lance Corporal Hiquiana, and the murder of Lance Corporal Hiquiana and Mrs. Hiquiana, and in order to effect the objects of the conspiracy, the said Corporal Reliford and Lance Corporal Clark were driven to the apartment of Lance Corporal Hiquiana by Corporal Shroeder and did rob Lance Corporal Hiquiana and Mrs. Hiquiana of a video cassette recorder, various video tapes, a 35 millimeter camera, a portable radio/cassette player, and a wallet consisting of an Armed Forces identification card, an American Express International Banking Card, a Navy Federal Credit Union membership card, for a combined total value of about $915.00, and an unknown amount of U.S. currency, the property of

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* *See United States v. Sorrell*, 23 M.J. 122 n.1 (C.M.A. 1986).

Lance Corporal Hiquiana, and a purse, U.S. currency of about $200.00 and Japanese currency of about 3,000 yen, for total unknown value, the property of Mrs. Hiquiana, and did also murder Lance Corporal Hiquiana and Mrs. Hiquiana.

And that the decision of the United States Navy Marine Corps Court of Military Review as to Charge I and its specification (consolidated), Charge II and its specifications of premeditated murder, Additional Charge I and its specifications, and the sentence is affirmed.

For the Court,

/s/ JOHN A. CUTTS, III
Deputy Clerk of the Court

cc: The Judge Advocate General of the Navy
Appellate Defense Counsel (SACCOCCIO)
Appellate Government Counsel (SCUDDER)

APPENDIX B

DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
200 STOVALL STREET
ALEXANDRIA VA 22332-2400

IN THE U.S. NAVY-MARINE CORPS COURT OF MILITARY REVIEW

NMCM 86-4905

UNITED STATES

v.

ROCKY L. RELIFORD, 299 68 2156
CORPORAL (E-4), U.S. MARINE CORPS

Decided 30 September 1987

Before: LEO J. COUGHLIN, J. T. GLADIS, and A. F. MIELSZARSKI

Sentence adjudged 21 August 1986. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 3d Force Service Support Group, FMF, Pacific, FPO San Francisco 96604.

LCDR ROBERT J. SMITH, JAGC, USN, Appellate Defense Counsel
LT CHRISTINE M. HAYES, JAGC, USNR, Appellate Defense Counsel
Maj LAURA L. SCUDDER, USMC, Appellate Government Counsel

PER CURIAM:

Appellant was tried by general court-martial (with officer and enlisted members) for violating Articles 81, 118, 121 and 123, Uniform Code of Military Justice (UCMJ). Pursuant to his pleas, appellant was found guilty of three specifications under Article 121, UCMJ, of larceny of currency totalling $6055.00. (The forgery offense of Article 123, UCMJ was withdrawn as being multiplicious for findings with the larceny offenses.) Contrary to his pleas, appellant was found guilty of one specification of conspiracy to commit murder and one specification of conspiracy to commit robbery in violation of Article 81, UCMJ, and two specifications of premeditated murder in violation of Article 118(1), UCMJ. Appellant was sentenced to be confined for life, to be reduced to pay grade E-1, and to be discharged from the Marine Corps with a dishonorable discharge. The convening authority approved the sentence as adjudged.

In the first assignment of error on review before this Court, it is asserted that:

APPELLANT WAS DENIED HIS RIGHT TO A SPEEDY TRIAL

We disagree that the appellant was denied his right to a speedy trial. We find compliance with the speedy trial mandates of the Rules for Courts-Martial (R.C.M.); *United States v. Burton,* 21 U.S.C.M.A. 112, 44 C.M.R. 166 (1971); and the Sixth Amendment of the Constitution and Article 10, UCMJ.

Appellant was placed in pretrial confinement and held continuously for 101 days before being brought to trial. Thus, the appellant was brought to trial within the 120-day requirement of R.C.M. 707(a). The 90-day requirement of R.C.M. 707(d), however, was not met unless the periods of delay described in subsection (c) of the Rule were properly excluded for the purposes of computing whether the 90 days had run.

In denying appellant's speedy trial motion to dismiss, the military judge found a total of only 73 days attributable to the Government (R. 121-123). He excluded a total of 28 days from government accountability, 22 of which appellant disputes on appeal. We conclude that the military judge did not err in excluding for "good cause" under R.C.M. 707(c)(8)—now R.C.M. 707(c)(9)—11 days "caused by extraordinary problems regarding Japanese authorities," nor did he err in excluding 10 days under R.C.M. 707(c)(2) for military judge unavailability. Although the military judge was incorrect in attributing the 19th of June to defense requested delay,[1] his correct exclusions totalling 27 days properly reduced the period of government accountability to 74 days, well within the

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[1] The 19th of June, however, may well have been excluded from government accountability for reasons other than "defense requested delay." At the Article 39a session held before Judge Holder on the 16th of June, the defense moved for "a continuance until the 19th." That military judge explained on the record that the earliest possible date for trial was the 30th of June vice the 19th in view of military judge unavailability, the upcoming proceedings in the companion cases of Clark and Shroeder, and the unexpected turn of events that weekend which transformed the instant case from being a guilty plea noncapital one to a contested capital one (R. 14-16). The exclusion from government accountability of much of this period might thus be justified under provisions in addition to R.C.M. 707(c)(2) for military judge unavailability. The rationale and circumstances underlying the need for such a delay would appear to constitute "good cause" under R.C.M. 707(c)(9). Also Judge Holder could have extended the 90-day period of confinement by 10 days under R.C.M. 707(d) for extraordinary circumstances. Finally, the delay from the 16th to the 30th of June may well have been "with the consent of the defense" and thus excluded from government accountability under R.C.M. 707(c)(3) since, when asked by the military judge for comment or objection to such a delay, the defense replied, "Sir, we'd just like to further reiterate again we're asking for three days, but we have no objection to 30 June." (R. 15).

90-day period of R.C.M. 707(d). Furthermore, we find that the Government showed adequate cause to excuse the delay in not bringing the accused to trial promptly upon his demands for immediate trial, and met its "heavy" burden to show that it had exercised due diligence in proceeding toward trial. R.C.M. 707(d), Discussion; *United States v. Burton,* 21 U.S.C.M.A. 112, 118, 44 C.M.R. 166, 172 (1971); *United States v. Harvey,* 23 M.J. 280 (C.M.A. 1986). *See also Barker v. Wingo,* 407 U.S. 514, 33 L.Ed.2d 101, 92 S.Ct. 2182 (1972). In conclusion, the appellant was not denied a speedy trial.

In his second assignment of error, appellant asserts that:

> WHERE APPELLANT'S CONVICTION OF PREMEDITATED MURDER MANDATED IMPOSITION OF A SENTENCE TO LIFE IMPRISONMENT, CONCURRENCE OF LESS THAN THREE-FOURTHS MAJORITY VIOLATES ARTICLE 52(b)(2).

In support of this assignment the appellant argues that Article 52(a)(2), UCMJ, which requires concurrence of only two-thirds of the members for a conviction, is inconsistent with Article 52(b)(2), which requires a three-fourths majority on any sentence in excess of ten years since, in effect, he could automatically be sentenced to life imprisonment on a mere two-thirds vote of the members. In appellant's view, Article 52(a)(2), (b)(2), and Article 118, UCMJ, should be read together so as to require a three-fourths majority concurrence for conviction of premeditated murder which carries a mandatory minimum sentence of life imprisonment. We disagree as did the Court of Military Appeals when faced with the same assignment of error in *United States v. Walker,* 7 U.S.C.M.A. 669, 23 C.M.R. 133 (1957). Furthermore, appellant's argument was implicitly rejected in the 1986

amendments to the Manual for Courts-Martial. *See also* Analysis, R.C.M. 1004, App. 21 at A21-65, wherein it is stated that, "Nothing in this provision [the new subsection (2) of R.C.M. 1004(a)] changes existing law under which a finding of guilty may be based upon a vote of two-thirds of the members, and a finding based upon a two-thirds vote will continue to provide the basis for sentencing proceedings in which *any sentence* other than death may be imposed." (Emphasis added).

We also find no merit in the appellant's third and final assignment of error:

> THE EVIDENCE WAS INSUFFICIENT TO PROVE BEYOND A REASONABLE DOUBT APPELLANT'S GUILT OF CHARGES I AND II AND THE SPECIFICATION THEREUNDER BECAUSE THE GOVERNMENT'S PRINCIPAL WITNESS, A CONVICTED CO-ACCUSED, MADE SEVERAL INCONSISTENT STATEMENTS REGARDING MATERIAL FACTS WHICH RENDERED HIS ENTIRE TESTIMONY UNWORTHY OF BELIEF.

Although appellate defense counsel's brief does not elaborate on this assignment, we will presume that it refers to the legal proposition that an accused may not be convicted solely on the uncorroborated testimony of an accomplice which "is self-contradictory, uncertain, or improbable." *United States v. Aguinaga,* __ M.J. __ (C.M.A. 21 September 1987); *United States v. Lee,* 6 M.J. 96 (C.M.A. 1978). Corporal Shroeder is the convicted co-accused referred to in this assignment of error. He was convicted of felony murder and robbery at a General Court-Martial held prior to the appellant's court-martial. His testimony at the appellant's court-martial was not "self-contradictory, uncertain, or improbable," notwith-

standing the fact that he clearly minimized his own involvement. Although he was not the hapless dupe of his friends, CPL Reliford and LCPL Clark, that he portrayed, he nevertheless provided clear and probable testimony of appellant's guilt. Furthermore, we find CPL Shroeder's testimony was sufficiently corroborated by independent evidence to support appellant's conviction. *See generally, United States v. Yeoman,* __ M.J. __ (C.M.A. 21 September 1987).

Finally, the evidence of record proves beyond a reasonable doubt, and we are so convinced, that the appellant conspired with LCPL Clark and CPL Shroeder to murder and rob LCPL and Mrs. Hiquiana (Charge I and the specifications thereunder), and, in fact, murdered LCPL and Mrs. Hiquiana (Charge II and the specifications thereunder). Thus, the third and final assignment of error is without merit.

Accordingly, the finding and sentence as approved on review below are affirmed.

The court-martial order shall be corrected to clearly reflect that the appellant was convicted of premeditated murder under Article 118(1), UCMJ, in Specifications 1 and 2 of Charge II.

LEO J. COUGHLIN, Senior Judge

J. T. GLADIS, Judge

A. F. MIELCZARSKI, Judge

NMCM 86 4905

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In the Supreme Court of the United States

OCTOBER TERM, 1988

ROCKY L. RELIFORD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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12 pp

QUESTION PRESENTED

Whether Article 52(a)(2) of the Uniform Code of Military Justice, 10 U.S.C. 852(a)(2), permits a defendant to be convicted by the concurrence of two-thirds of the members of a court-martial panel for an offense with a mandatory minimum sentence of life imprisonment.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-767

ROCKY L. RELIFORD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Military Appeals (Pet. App. 1a-3a) is reported at 27 M.J. 176. The opinion of the Navy-Marine Corps Court of Military Review (Pet. App. 4a-9a) is unreported.

JURISDICTION

The judgment of the Court of Military Appeals was entered on August 12, 1988. The petition for a writ of certiorari was filed on November 8, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. (Supp. IV) 1259(3).

STATEMENT

Petitioner, a member of the United States Marine Corps, was convicted by a general court-martial of conspiracy to commit robbery, conspiracy to commit murder, two specifications of premeditated murder while perpetrating a robbery, and larceny, in violation of Articles 81, 118, 121, and 123 of the Uniform Code of Military

Justice (UCMJ), 10 U.S.C. 881, 918, 921, and 923. Petitioner was sentenced to confinement for life, forfeiture of all pay and allowances, reduction to pay grade E-1, and a dishonorable discharge. The convening authority approved the findings and sentence. The Navy-Marine Corps Court of Military Review affirmed the findings and sentence (Pet. App. 4a-9a). The Court of Military Appeals consolidated the two conspiracy charges but otherwise affirmed (*id.* at 1a-3a).

1. The charges against petitioner arose from the robbery and murder of Marine Lance Corporal Raymond Hiquiana and his wife Mabel in Kitanakagusuku, Okinawa. According to an accomplice, Corporal Michael Shroeder,[1] petitioner and another Marine, Corporal Alan Clark, decided to rob and murder the reputedly wealthy Hiquianas (Tr. 463-464). Shroeder asked to go along, and he served as the driver (Tr. 464-465). Petitioner and his confederates staked out the Hiquianas' apartment and followed Raymond Hiquiana as he drove to pick up his wife at work. The conspirators then quickly returned to the Hiquianas' apartment and waited outside the apartment for the Hiquianas to return (Tr. 464-473). Petitioner and Clark persuaded the Hiquianas to let them into the apartment while Shroeder stayed with the car (Tr. 473-475). Petitioner and Clark later returned to the car, covered with blood and carrying stolen stereo and video equipment (Tr. 475-477). As Shroeder drove the gang to petitioner's apartment, petitioner and Clark described how they had killed the Hiquianas by slitting their throats with utility knives (Tr. 478-479). Petitioner later used Raymond

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[1] Shroeder confessed to his role in the murders and testified for the government at petitioner's trial after being convicted in a separate proceeding (Tr. 460-512).

Hiquiana's identification to withdraw the Hiquianas' savings from their local accounts.[2]

2. A court-martial is a bifurcated proceeding with separate guilt and sentencing stages, and the members of the court-martial panel must separately decide each question. When capital punishment is the mandatory penalty for a charged crime, the panel members must agree unanimously to convict a servicemember of that offense. Art. 52(a)(1), UCMJ, 10 U.S.C. 852(a)(1). For any other offense, a servicemember may be convicted by a two-thirds vote of the panel. Art. 52(a)(2), UCMJ, 10 U.S.C. 852(a)(2). The sentencing stage then commences. After hearing evidence in aggravation and mitigation, the panel votes on an appropriate sentence. In order to impose a capital sentence, the panel must be unanimous. Art. 52(b)(1), UCMJ, 10 U.S.C. 852(b)(1). To impose a sentence of life imprisonment or a term of confinement for more than ten years, three-fourths of the panel must agree. Art. 52(b)(2), UCMJ, 10 U.S.C. 852(b)(2). Any other sentence may be imposed by a two-thirds vote of the panel. Art. 52 (b)(3), UCMJ, 10 U.S.C. 852(b)(3).

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[2] Shroeder's testimony was corroborated by several other items of evidence: For example, petitioner was identified by a bank teller as the person who withdrew the Hiquianas' savings, and petitioner's fingerprints were found on the bank documents (Tr. 557-558, 615-616). Petitioner gave his girlfriend a gold bracelet that had belonged to Mabel Hiquiana (Tr. 536). Petitioner's fingerprints were found on two videotapes stolen from the Hiquianas' apartment (Tr. 486, 571). The blood found in Shroeder's car was consistent with Shroeder's story (Tr. 445, 449-451, 574-575). An Okinawan mechanic testified that he had helped petitioner hide the stolen video equipment and that he later helped Shroeder dispose of it (Tr. 539-540). Shroeder also made admissions to a friend that were consistent with his confession. The friend watched Shroeder clean out his car and helped Shroeder dispose of the bloody videotapes (Tr. 715-721).

In this case, the court-martial members were instructed at the guilt stage of trial, without defense objection, that a two-thirds majority vote was required to convict petitioner of each of the charged offenses (Tr. 770). The panel found petitioner guilty of all charges and specifications (Tr. 784). During the sentencing phase of the trial, again without objection by the defense, the court members were instructed that life imprisonment was the mandatory penalty for premeditated murder, although all other aspects of the sentence (such as the appropriate amount of pay that petitioner should forfeit) were open for their consideration (Tr. 810). The panel members were also instructed to vote on each proposed sentence in its entirety until they reached the required three-quarters concurrence (Tr. 817). The members imposed a sentence that included confinement for life (Tr. 819).

ARGUMENT

Petitioner argues that his murder conviction is invalid because the court-martial panel was instructed that he could be convicted by a two-thirds vote of the panel members. Although Article 52(a)(2) of the UCMJ, 10 U.S.C. 852(a)(2), provides that a two-thirds majority of the court-martial panel is sufficient to convict a defendant for any offense except one in which the death penalty is mandatory, petitioner argues that a separate provision, Article 52(b)(2) of the UCMJ, 10 U.S.C. 852(b)(2), which requires a three-fourths majority vote to impose a sentence of ten or more years' confinement, should be interpreted to require the concurrence of three-fourths of the members of a court-martial panel to convict a defendant in any case in which he is charged with a crime for which there is a mandatory life sentence. Petitioner's contention does not warrant review by this Court, for several reasons.

1. Petitioner did not properly preserve his claim because he did not object at trial to the instruction that he could be found guilty of the charged offenses if two-thirds of the court-martial panel concurred in that finding. Petitioner did not raise that claim until after the court-martial panel had returned its findings, had sentenced him, and had been discharged (Tr. 821).[3] Accordingly, petitioner has waived his claim by failing to assert it in a timely fashion.

2. Petitioner's claim is also not properly raised by the record in this case. The gravamen of petitioner's claim is that a serviceman should not be sentenced to life imprisonment unless three-fourths of the court-martial panel have concurred in that sentence. The panel members in this case, however, were instructed in that manner at the sentencing phase. The trial judge instructed the panel members to "[v]ote on each sentence in its entirety, beginning with the lightest, until you reach the required concurrence, which is three-quarters" (Tr. 817). That instruction therefore fulfills the mandate of Article 52(b)(2) that the panel members should reach a three-fourths concurrence on every sentence imposing ten or more years of confinement.

3. Petitioner's contention involves a narrow question of the proper construction of the Uniform Code of Military Justice that has no application beyond the military

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[3] Article 51(a) of the UCMJ, 10 U.S.C. 851(a), requires that the members vote by secret ballot. Even when more than two-thirds of the members vote to convict, that fact is not made public (see Tr. 770). The petition is therefore somewhat misleading when it states (Pet. 7-8) that petitioner was convicted by a two-thirds vote. The unopposed instruction to the court-martial panel ensured that there were at least eight (of eleven) votes for conviction. In fact, there may have been more. Petitioner also did not ask to have the panel members polled on their vote. Thus, only the required two-thirds vote for conviction was announced.

justice system and that presents no conflict among the circuits. The Court of Military Appeals rejected an identical claim in *United States* v. *Morphis,* 7 C.M.A. 748, 752-754, 23 C.M.R. 212, 216-218 (1957), and *United States* v. *Walker,* 7 C.M.A. 669, 673-675, 23 C.M.R. 133, 137-139 (1957), and it recently reaffirmed those decisions in the course of affirming the conviction of one of petitioner's accomplices, *United States* v. *Shroeder,* 27 M.J. 87, 88-91 (C.M.A. 1988), petition for cert. pending, No. 88-873.[4] The interpretation of the Uniform Code of Military Justice adopted by the military courts and the armed services is entitled to considerable deference. *Middendorf* v. *Henry,* 425 U.S. 25, 43 (1976); *Hiatt* v. *Brown,* 339 U.S. 103, 109 (1950). In *Walker, Morphis,* and *Shroeder,* the Court of Military Appeals reconciled Article 52(a)(2) and Article 52(b)(2) by noting that the first provision deals with the number of votes required for a conviction for particular offenses, while the second article deals with the number of votes required for a court-martial panel to impose particular sentences. The two votes occur at different points in the proceedings, the court pointed out, and they address different issues. The first vote concerns the question whether the government has proved that the accused committed the charged offenses, whereas the vote on sentencing requires the panel members to decide how severely the defendant should be punished. For these reasons, the Court of Military Appeals concluded that it was reasonable to treat the two votes separately in the statute. The court found nothing in the language of the UCMJ or its predecessors to justify applying the three-

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[4] See also *United States* v. *Dodson,* 16 M.J. 921 (N.M.C.M.R. 1983) (rejecting an identical claim without discussion), aff'd on other grounds, 21 M.J. 237, supplemented on denial of petition for reconsideration, 21 M.J. 276 (C.M.A.), cert. denied, 479 U.S. 1006 (1986).

fourths concurrence rule of Article 52(b)(2) to the guilt stage in cases in which life imprisonment is mandatory. See, *e.g.*, *United States* v. *Shroeder*, 27 M.J. at 91.

The Court of Military Appeals' decisions in *Walker*, *Morphis*, and *Shroeder* are consistent with the decisions of the federal courts that have considered the relationship between Articles 52(a)(2) and (b)(2) of the UCMJ. See *McKinney* v. *Warden*, 273 F.2d 643, 644 (10th Cir. 1959), cert. denied, 363 U.S. 816 (1960); *Anderson* v. *Hunter*, 177 F.2d 770, 771 (10th Cir. 1949); *Stout* v. *Hancock*, 146 F.2d 741, 743-745 (4th Cir. 1944), cert. denied, 325 U.S. 850 (1945); *Brown* v. *Hiatt*, 81 F. Supp. 647, 650 (N.D. Ga. 1948), aff'd on other grounds, 175 F.2d 273 (5th Cir. 1949), rev'd on other grounds, 339 U.S. 103 (1950); *Hurse* v. *Caffey*, 59 F. Supp. 363, 364-365 (N.D. Tex. 1945); see also *Ex parte Campo*, 71 F. Supp. 543, 545 (S.D.N.Y.), aff'd *sub nom. United States ex rel. Campo* v. *Swenson*, 165 F.2d 213 (2d Cir. 1947). Like the Court of Military Appeals, those courts have concluded that Articles 52(a)(2) and (b)(2) establish separate and independent majority voting requirements for the guilt and sentencing stages of a court-martial.

Even apart from the deference due to the Court of Military Appeals' construction of the UCMJ, that court's analysis of the statutory scheme is correct. The plain language of Articles 52(a)(2) and 118 of the UCMJ, 10 U.S.C. 852(a)(2) and 918, supports the Court of Military Appeals' conclusion that a defendant may be found guilty of murder by a two-thirds vote of a court-martial panel. Article 52(a)(2) fixes a two-thirds majority vote requirement for conviction of any offense when capital punishment is not the mandatory penalty, and under Article 118, capital punishment is not the mandatory punishment for murder. If Congress had intended that murder would be exempt from the two-thirds majority vote requirement

established by Article 52(a)(2), Congress could easily have drafted the provision in that manner, as it did in the case of Article 52(a)(1) for crimes with a mandatory death penalty. Nothing in the text or legislative history of the statute, however, shows that Congress intended that result when it enacted the UCMJ. See H.R. Rep. 491, 81st Cong., 1st Sess. 26 (1949); S. Rep. 486, 81st Cong., 1st Sess. 23 (1949); see also W. Winthrop, *Military Law and Precedents* 377, 395 (2d ed. 1920). Furthermore, Congress has not amended the UCMJ to overrule the Court of Military Appeals' interpretation of these provisions in *Walker* and *Morphis* despite the fact that there have been three major revisions of the UCMJ since 1949. Accordingly, the court-martial panel members were properly instructed to reach their verdict at the guilt stage of petitioner's trial by a two-thirds vote.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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